

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARTINHO TAVARES RODRIGUES,

Petitioner,

v.

Civil Action No. 5:10CV53
(STAMP)

ERIC HOLDER, U.S. Attorney General,
IMMIGRATION & CUSTOMS ENFORCEMENT,
and DEPARTMENT OF HOMELAND SECURITY,

Respondents.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE;
GRANTING THE PETITIONER'S LETTER
MOTION FOR CLARIFICATION;
AND TRANSFERRING CASE TO THE
FOURTH CIRCUIT COURT OF APPEALS

I. Background

On May 14, 2010, Martinho Tavares Rodrigues, an inmate at the Gilmer Federal Correctional Institution in Glenville, West Virginia, filed a pro se¹ petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging a final order of removal issued by the Bureau of Immigration and Customs Enforcement. The petitioner challenges his deportation order because he asserts that he derived citizenship from his naturalized father and because his counsel was ineffective during his removal proceedings. This matter was referred to United States Magistrate Judge John S. Kaul

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1341 (9th ed. 2009).

for report and recommendation pursuant to Local Rule of Prisoner Litigation Procedure 83.09.

The magistrate judge entered a report and recommendation on June 1, 2010, recommending that the petitioner's civil action be transferred to the Fourth Circuit Court of Appeals for all further proceedings. The magistrate judge advised the parties that, pursuant to 28 U.S.C. § 636(b)(1)(C), any party may file written objections to his proposed findings and recommendations within fourteen days after being served with a copy of the magistrate judge's recommendation. On June 9, 2010, the petitioner filed a letter addressed to the Clerk of Court's office asking for clarification on whether his case would transfer to the Fourth Circuit automatically. The petitioner also indicates that he does not intend on responding to the magistrate judge's report and recommendation. The petitioner's letter motion for clarification is granted. For the reasons set forth below, this Court finds that the report and recommendation by the magistrate judge must be affirmed and adopted in its entirety, and the petitioner's civil action must be transferred to the Fourth Circuit Court of Appeals.

II. Legal Standard

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. However, failure to file objections to the magistrate judge's proposed findings and

recommendation permits the district court to review the recommendation under the standards that the district court believes are appropriate and, under these circumstances, the parties' right to de novo review is waived. See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Because the petitioner did not file objections, this Court reviews the report and recommendation of the magistrate judge for clear error.

III. Discussion

The REAL ID Act of 2005 eliminated federal district courts' jurisdiction over habeas petitions attacking removal orders pursuant to 28 U.S.C. § 2241. Dragenice v. Gonzales, 470 F.3d 183, 186 (4th Cir. 2006). Congress provided that the "sole and exclusive means for judicial review of an order of removal" is a petition filed with "an appropriate court of appeals." 8 U.S.C. § 1252(a)(5).

This Court agrees with the magistrate judge that the petitioner's habeas petition is a clear and direct challenge to his removal order. Pursuant to section 106(a) of the REAL ID Act of 2005, this Court finds that it does not have jurisdiction to hear the petitioner's claims under 28 U.S.C. § 2241. Accordingly, this civil action is transferred to the Fourth Circuit Court of Appeals.

IV. Conclusion

This Court finds that the magistrate judge's recommendation is not clearly erroneous and hereby AFFIRMS and ADOPTS the report and

recommendation of the magistrate judge in its entirety. Accordingly, the petitioner's civil action is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit for all further proceedings. It is ORDERED that this civil action be DISMISSED and STRICKEN from the active docket of this Court.

Under Wright v. Collins, 766 F.2d 841, 845 (4th Cir. 1985), the petitioner's failure to object to the magistrate judge's proposed findings and recommendation bars the petitioner from appealing the judgment of this Court.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to the pro se petitioner by certified mail and to the Clerk of the Fourth Circuit Court of Appeals.

DATED: June 10, 2010

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE